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BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

REPLY COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

Of Counsel:

JEFFREY R. MORELAND
RICHARD E. WEICHER
The Burlington Northern and Santa Fe
Railway Company

MARCELLA W. SZEL
Canadian Pacific Railway Company

MARK G. ARON
PETER J. SHUDTZ
CSX Transportation, Inc.

RICHARD P. BRUENING
ROBERT K. DREILING
Kansas City Southern Railway Company

J. GARY LANE
GEORGE A. ASPATORE
Norfolk Southern Railway Company

JAMES V. DOLAN
Union Pacific Railroad Company

LOUIS P. WARCHOT
Association of American Railroads
50 F Street, N.W.
Washington, D.C. 20001

SAMUEL M. SIPE, JR.
ANTHONY J. LAROCCA
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795

Counsel for the Association
of American Railroads

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The Association of American Railroads ("AAR") has carefully reviewed the comments submitted in response to the Board's October 3, 2000 Notice of Proposed Rulemaking (NOPR).[1] The comments reflect broad support for the Board's increased emphasis on service assurance. Most commenters, including AAR, applaud the Board's proposed Service Assurance Plans, the proposed Service Councils, and the commitment in the Board's proposed rules to careful scrutiny of service issues during the oversight process. Since the principal concern in recent mergers has been with temporary service disruptions, the Board's proposals in these areas are positive steps forward.

The Board's proposed rules go well beyond the subject of the effect of mergers on rail service, however, and emphasize broad proposals for restructuring rail-to-rail competition through merger proceedings. In a fundamental departure from current practice, the Board's proposed rules would presume that harms will flow from future mergers, and that those harms

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[1] The Canadian National Railway Company is not a participant in these Reply Comments.

must be addressed through mandatory, non-remedial competitive conditions. There is no consensus among the commenting parties on these proposals. AAR and its member railroads oppose this approach to merger review as inconsistent with the statutory public interest standard and with sound administrative decisionmaking. The shipping community criticizes the Board's proposal because it does not go far enough toward fundamental restructuring of the industry. Several shippers oppose the proposal because it would create different regulatory standards for merging and non-merging railroads.

As AAR explained in its opening comments, there is no justification for the Board's proposal to restructure rail markets through mandatory, non-remedial conditions and the Board should abandon it. In lieu of presumptions, the Board's merger rules should ensure a thorough case-by-case examination of particular merger proposals to determine whether any adverse effects on competition are likely and whether remedies for those adverse effects can be fashioned. The Board should encourage market-based, private sector initiatives that result in more vigorous competition, but it should not seek to restructure railroad markets by imposing conditions that are unrelated to any merger harms as a price for the Board's approval of a merger.

The proposals for more extreme versions of restructuring advocated by various shipper interests should be summarily rejected. Though diverse in the wide array of pro forma conditions that they advocate, these proposals share two fundamental flaws. They are unrelated to the effects of rail mergers and they lack any foundation in the statutory public interest standard. Some commenters acknowledge that the conditions they propose would discourage or prevent future mergers. Thus, mergers that could improve service, enhance competition or bring other public benefits would not be pursued because of the cost of complying with broad and arbitrary conditions. Other commenting shippers view this rulemaking proceeding as an

opportunity to advocate restructuring of rail markets beyond the merger context. The Board clearly stated in its NOPR that such restructuring is beyond the scope of the Board's public interest inquiry in merger cases and therefore would be inappropriate to consider in this proceeding.

The range and number of proposals the Board received for restructuring rail competition through merger rules reinforce AAR's concern that the Board's proposal for mandatory non-remedial conditions would only complicate and delay merger reviews. The proposals received by the Board in this rulemaking are just a preview of the vast array of requests for special conditions that the Board could expect to receive in an actual merger case. A rule that requires non-remedial conditions amounts to an invitation for expanded litigation over issues having nothing to do with the merits of a particular merger. Merger proceedings that are already long and complex would become more protracted. AAR believes the Board should be looking for ways to expedite, not prolong merger proceedings.

AAR is principally concerned with the Board's proposal on the restructuring of rail competition and the comments responsive to that proposal. These reply comments focus on that issue. AAR also briefly addresses the commenting parties' proposals for an expansion of regulation in other areas, such as the review of joint ventures and alliances and the creation of new service remedies. AAR's members are submitting separate reply comments that address these and other issues raised in the comments.

I. RESTRUCTURING RAIL MARKETS

The Board's proposal for restructuring rail markets attracted the most commentary. Among the shippers, who were generally critical of the proposal, there were three recurrent themes: (1) the proposal is insufficient to ensure a fundamental restructuring of the railroad

industry; instead, the Board should impose blanket, pro-forma conditions on merging parties regardless of the facts of a particular merger; (2) the Board should ignore the role of intermodal competition in rail markets; and (3) the Board should impose conditions on non-merging railroads as well as merger applicants. AAR addresses these themes below.

A. Proposals For Broad Pro-Forma Conditions

Shippers and shipper groups widely criticized the Board's proposal for failing to specify the mandatory, non-remedial conditions to which merger applicants must submit. These commenting parties urged the Board to impose on merger applicants broad, pro-forma conditions that are unrelated to the effects of a particular mergers.

What is notable about the proposals is not only the range of conditions sought but the degree of reregulation that these commenting parties are seeking. While many of the commenting parties claim to be advocates of competitive markets, it is clear they are in fact looking for a return to highly intrusive regulation of railroad conduct. This can be seen from a brief survey of the proposals:

- Post-Merger Rate Regulation: Several commenting parties propose the establishment of rate caps or new forms of rate regulation post-merger.[2]
- Mandatory Creation of Multiple Carrier Options: Several commenting parties propose that the Board's merger rules should be used to create multiple carrier options for all shippers, through forced divestitures or

[2] *See, e.g.*, Comments of the American Chemistry Council and the American Plastics Council ("ACC") at 14 (mandatory rate caps); Dow Chemical Company ("Dow") at 14-16 (modified rate review procedures); PPL Generation, LLC and PPL Montana, LLC ("PPL") at 12-15 (same); Shell Oil Company and Shell Chemical Company ("Shell") at 14 (same); United States Department of Agriculture ("USDA") at 17 (post-merger rate increases limited by RCAF-A).

mandatory "access conditions."[3] New regulatory standards for compensation are proposed to accompany these "access" conditions.

- Gateway Regulation: Several commenters assert that it is not enough to preserve major gateways and contend that the Board should require that *all* gateways be kept open and that new regulations be developed governing access to those gateways.[4]

- Mandatory Terminal Access and Reciprocal Switching with Board Oversight of Charges: A number of parties urge the Board to impose on all merging railroads a requirement to provide switching on demand within terminal areas and at other points where interchange is possible.[5] Once again, the Board would be required to administer standards governing compensation.[6]

- Overturn the Bottleneck Rules: Several shippers urged the Board to overturn the Board's "Bottleneck" rules and require merging railroads to quote rates between any two points where interchange can occur and make it clear that shippers could bring new cases challenging those rates.[7]

- Eliminate "Paper Barriers:"[8] A common proposal was that merging carriers should be required to cede contractual covenants in overhead trackage rights agreements and in line sale agreements.[9]

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[3] *See, e.g.*, Comments of IMC Global, Inc. ("IMC") at 4 (aggressive use of divestiture powers); the Committee to Improve American Coal Transportation ("IMPACT") at 10 (increase the number of carriers serving significant markets); Subscribing Coal Shippers et al. at 14-15 (access to merging carrier's lines on demand).

[4] *See, e.g.*, Comments of Ameren Services Company ("Ameren") at 3 (all gateways should remain open); National Grain and Feed Association ("NGFA") at 7-8 (regulation of rates for traffic over open gateways); Weyerhauser at 4 (Board should consider reopening previously closed gateways).

[5] *See, e.g.*, Comments of Consumers United for Rail Equity ("CURE") at 8-9 (switching required in terminal areas and at interchange points); Martin Marietta Materials, Inc. ("Martin Marietta") at 6-7 (same); Shell at 13 (adopt Canadian interswitching model).

[6] *See, e.g.*, Comments of Certain Coal Shippers (Board-established uniform switching charge applicable to a terminal area); Weyerhaeuser at 3-4 (annual Board determinations of switching charges).

[7] *See, e.g.*, Comments of CURE at 4-5; E.I. Du Pont De Nemours ("Du Pont") at 7; Edison Electric Institute ("EEI") at 6-7; Subscribing Coal Shippers et al. at 16-18.

[8] Kansas City Southern Railway Company has favored disclosure and justification of certain "paper barriers" in the context of merger proceedings.

It is hard to believe that the shippers proposing these conditions expect the Board to take them seriously. These proposals are not offered as a solution to particular harms created by future mergers. The objective of these commenting parties is to restructure railroad markets for their own perceived short term benefit through new regulation, not to address the effects of future mergers. The facts of particular mergers are irrelevant to these parties, who urge the Board to impose blanket conditions as a substitute for analysis of the facts.

As AAR noted in its opening comments, sound decisionmaking requires a careful analysis of the record. Regulatory decisions must be based on the facts of particular cases. Pro-forma conditions imposed with no regard to the effects of particular mergers would ensure arbitrary regulatory decisions. The Board should examine each merger on a case-by-case basis to determine whether specific, narrowly tailored conditions are needed to remedy any adverse competitive effects.

The broad application of pro-forma conditions urged by many commenting parties would undermine the public interest. As the Department of Transportation pointed out, broad competitive conditions could have adverse effects in an "industry such as the rail industry, which is characterized by decreasing costs and [which] requires differential pricing to recover full costs."[10] The blanket imposition of pro-forma conditions could also "inadvertently exacerbate merger implementation difficulties through increased congestion," contrary to the Board's clear objective to reduce or eliminate the possibility of service disruptions from future mergers.[11]

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[9] *See, e.g.*, Comments of Ameren at 3; American Short Line and Regional Railroad Association ("ASLRRA") at 3; Certain Coal Shippers at 19; CURE at 5; PPL at 15-18; Subscribing Coal Shippers et al. at 18-20.

[10] Comments of the United States Department of Transportation ("USDOT") at 4.

[11] Id. at 5.

Moreover, these proposals for restructuring through merger conditions are flatly inconsistent with the principles of market-based regulation in the Staggers Act. Under the existing statute, the structure of railroad markets is supposed to result from decisions by market participants, not by regulators. The ICC "rejected the notion that the Staggers Act is a mandate for [the Commission] to compel restructuring of the rail industry to create more rail-to-rail competition."[12] For this reason, the Board's responsibility in the merger context is "to evaluate *carrier-originated* proposals to determine whether they are consistent with the public interest."[13] The Board 's review of mergers is not intended to be a mechanism for restructuring rail markets. The imposition of broad, pro-forma merger conditions would fundamentally change the role of the Board in regulating the railroad industry, but the Board has acknowledged that this rulemaking proceeding is not intended to be an "overhaul of the existing regulatory framework." NOPR at 16.

Many of the commenting parties justify their proposals for broad pro-forma conditions on grounds that the Board's proposal for restructuring rail markets is too vague.[14] AAR agrees that the proposed requirement that merging parties implement non-remedial competitive conditions creates great uncertainty because it is unclear what would suffice to pass Board muster. But the solution is not to impose blanket, presumptive conditions that are unrelated to the circumstances of a particular merger. Instead, the Board should adhere to the approach called for under the

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[12] *Intramodal Rail Competition – Proportional Rates*, Ex Parte No. 445 (Sub-No. 2), slip op. at 4 (served May 2, 1990).

[13] *See, e.g., Union Pacific Corporation et at al. – Control – Missouri Pacific*, 366 I.C.C. 459, 566-72 (1982).

[14] *See, e.g.*, Comments of the Alliance for Rail Competition ("ARC") at 1; NGFA at 4-5; PPL at 7-12; Subscribing Coal Shippers et al. at 5.

existing statutory scheme of imposing conditions that are designed to remedy particular competitive harms posed by a merger.

B. Intermodal Competition

Several commenting parties urge the Board to ignore the role of intermodal competition in applying the statutory public interest standard.[15] To these parties, a future merger that significantly enhances intermodal competition and has no adverse effects should be denied unless the merger also includes a restructuring of rail-to-rail competition. As one commenting party put it: "the public benefit is only served when policies intended to enhance competition . . . are focused on enhancing rail-to-rail competition."[16] In effect, these commenters are willing to sacrifice the public benefits that would flow from enhanced intermodal competition in order to advance their own regulatory agenda.

The governing statute does not recognize a distinction between enhanced intramodal competition resulting from the voluntary undertakings of merger applicants and enhanced intermodal competition. Both are public benefits. The Board in the past has recognized that rail-to-rail competition can be enhanced through the voluntary initiatives of the merger applicants. It has also recognized that mergers can lead to enhanced intermodal competition, which also benefits the public.

It would be inconsistent with the statutory public interest standard for the Board not to give full credit to the benefits of enhanced intermodal competition in reviewing an application for merger approval. The ICC and the Board are well aware of the importance of intermodal

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[15] *See, e.g.*, Comments of Certain Coal Shippers at 7-11; Dow at 5; National Industrial Transportation League ("NITL") at 11; the Fertilizer Institute and the Canadian Fertilizer Institute ("TFI") at 6-7.

[16] Comments of ARC at 2.

competition in transportation markets. Railroads face pervasive competition from trucks and barges. Trucks command the lion's share of the overall surface transportation market and compete effectively for movements of most commodities. Barges are effective competitors for many bulk commodities that are especially suited to rail transportation. The vigor of competition between railroads and these other transportation modes has spurred innovation and resulted in efficient transportation alternatives for shippers.

As many commenters acknowledge, recent mergers have been driven in large part by the rail carriers' need to compete more effectively with other transportation modes. This competition will become increasingly important as the Nation's non-railroad transportation infrastructure, particularly publicly funded highways, experiences intensified capacity constraints. The public is clearly served by maintaining and expanding a viable rail network as a competitive alternative to trucks and barges. If a future merger advances this public interest, it would be unwise and unlawful for the Board to ignore those benefits.[17]

Congress clearly understood the benefits of intermodal competition when it enacted the Staggers Act. One of the explicit goals of the Staggers Act was to foster competition between railroads and other transportation modes. The statute states that "it is the policy of the United States Government . . . to ensure effective competition and coordination between rail carriers and other modes."[18] Congress also understood when it enacted the Staggers Act that the railroads' loss of market share to trucks was one of the factors leading to their financial downturn in the

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[17] Kansas City Southern Railway agrees that intermodal competition should be a factor in assessing the competitive impacts of a merger, but believes the predominant focus in assessing proposed rail mergers should be on preserving the pre-merger level of rail-to-rail competition at locations adversely impacted by the proposed merger.

[18] 49 U.S.C. §10101(5).

1970s. An important goal of the Staggers Act was to promote intermodal competition by reducing regulatory burdens on railroads. It would not be appropriate for the Board to ignore that important goal in carrying out its merger review responsibilities.

C. Application of New Merger Rules To Non-Merging Railroads

Some shipper interests openly urge the Board to use this rulemaking proceeding to adopt new competitive access regulations generally applicable to the railroad industry.[19] They argue that the Board's approach to restructuring rail competition will "result in an inequitable and asymmetrical situation for shippers on the non-merging versus merging carriers."[20] To avoid this asymmetry, they urge the Board to "impose concomitant access over the lines of non-merging carriers."[21]

The governing statute would not permit such an expansion of the Board's merger review authority. The Board has authority under the statute to "impose conditions governing the transaction," not the operations of other, non-merging railroads.[22] Moreover, the statute gives merger applicants the choice to accept the conditions or abandon the transaction. Under the proposal of these commenting parties, the non-merging railroads would be forced to accede to conditions without any say in the matter and without the prospect of merger-related benefits such as cost savings. The notion that a regulator could impose conditions on non-merging parties would be utterly foreign to antitrust enforcement agencies.

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[19] *See, e.g.*, Comments of CURE at 5-7; TFI at 9-10; IMC at 6.

[20] Comments of NITL at 15.

[21] *Id.* at 17.

[22] 49 U.S.C. §11324(c).

The proposal would also undermine the Board's *Intramodal Competition Rules,*[23] which govern the circumstances in which the Board will consider requests for terminal access, mandatory reciprocal switching, and the prescription of a through route or joint rate. A critical element of those rules, which the ICC and the Board have repeatedly endorsed, is that access conditions will not be imposed on a carrier unless there is a finding that the carrier abused its market power.[24] The proposal that the Board apply access conditions to non-merging carriers, in the absence of any such finding, would be flatly inconsistent with those rules.

The Board has already declared that this proceeding is addressed to changes in its merger rules and that "it would be improper for us to impose additional conditions that, if put into effect, would in essence represent a complete overhaul of the existing regulatory framework." NOPR at 16. It would be inappropriate even to consider the proposals of these commenters for broad changes to the *Midtec* standard.

II. ALLIANCES AND JOINT VENTURES

Several shippers urge the Board to extend its regulatory jurisdiction beyond the review of mergers to include alliances and joint ventures. These commenting parties generally support the Board's proposal to consider whether the benefits of a merger can be obtained through other means, such as alliances or joint ventures, but at the same time they urge the Board not to encourage the formation of these arrangements, which they claim "can have anticompetitive

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[23] 49 C.F.R. Part 1144.

[24] *Midtec Paper Corp. v. United States,* 857 F.2d 1487 (D.C.Cir. 1988).

effects."[25] Once again, the proposed solution is more regulation: "non-merger cooperative agreements should be subject to Board review."[26]

There is no basis for new rules or increased scrutiny regarding alliances and joint ventures. The governing statute does not give the Board authority to review and approve transactions that do not involve the acquisition of "control"[27] or the "pooling" of transportation or earnings.[28] As the Board has recognized, voluntary arrangements involving marketing and service cooperation are "entered into regularly by rail carriers without the need for our approval."[29] Joint operating and marketing agreements can permit carriers to offer more efficient service. Joint purchasing agreements can reduce costs. By imposing new regulatory oversight on these arrangements, the Board would discourage railroads from entering into them and shippers would be denied the benefits they offer.

The commenting parties recognize that these transactions remain subject to the same antitrust laws that apply to similar transactions in other industries, but they claim that the application of antitrust standards to these arrangements does not go far enough. They assert that the "rule of reason" test applied by antitrust agencies is too permissive, since it allows cooperative arrangements to go forward unless the "overall competitive effect . . . is anticompetitive."[30] The commenting parties fail to explain why this standard is inappropriate for

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[25] Comments of ACC at 11. *See also* Comments of NITL at 27-30; Du Pont at 7-8; Ohio Rail Development Commission at 16.

[26] Comments of Dow at 20.

[27] 49 U.S.C. §11323.

[28] 49 U.S.C. §11322.

[29] *Canadian National Railway Co. et al. – Control – Illinois Central Corp. et al.*, slip op. at 25 (served May 25, 1999).

[30] Comments of NITL at 30. *See also* Comments of Dow at 21.

railroads. If an arrangement creates no net anticompetitive effects, it would seem obvious that there is no reason to prohibit or restrain it. Indeed, regulatory interference with such an arrangement would only put at risk the competitive benefits the arrangement could offer. This is an antitrust principle of long standing, and the commenting parties' rejection of it casts doubt on their professed commitment to competitive market standards.

The Board should not adopt rules that would discourage alliances and joint ventures. As the Board has recognized, such voluntary arrangements can be pro-competitive. It would be bad policy to jeopardize the benefits of these agreements by subjecting them to new regulatory scrutiny. Time consuming regulatory proceedings would deter railroads from pursuing these arrangements and would delay the benefits from any arrangements that were pursued.

III. SERVICE ASSURANCE PLANS

Most commenting parties agree with the Board's emphasis in the proposed rules on service assurance and careful oversight of merger implementation. The Board's proposed Service Assurance Plans and the proposed establishment of Service Councils and problem resolution teams are widely supported.

Several commenters urge the Board to go farther and create new legal remedies for merger-related service disruptions. As one commenter put it: "The Board will not have done all that it can do to assure adequate service *unless* it imposes financial penalties on railroads who fail to provide appropriate service as a result of a merger."[31] To ensure that the "financial

[31] Comments of EEI at 9.

penalties" are real, many commenting parties urge the Board to require merger applicants to agree to streamlined arbitration over service claims or other expedited proceedings.[32]

Railroads already have financial and commercial incentives to avoid service disruptions. The increased costs and lost revenues that result from service disruptions are incentive enough for merging railroads to avoid them. In addition, since most railroad shippers have competitive alternatives, a railroad faces a real risk of losing its customer base if it cannot maintain reasonable service. As one commenting party noted, service problems resulting from the recent Conrail transaction "forced [them] to ship traffic by truck that was previously carried by Conrail. . . ."[33] Another party noted that service problems in recent mergers "drove rail business to truck."[34] The railroads have an obvious incentive without new remedies to avoid these commercial penalties.

In addition, numerous remedies for service-related disruptions are already available. Shippers frequently protect themselves by negotiating service guarantees and remedies for inadequate performance in rail transportation contracts. Civil court remedies, including damages, are available in appropriate cases. Other remedies are available from the Board. The Board recently announced a new Rail Consumer Assistance Program to assist rail users in disputes with the railroads over service issues. Further, in Ex Parte No. 628, the Board adopted new expedited procedures specifically to address service emergencies.

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[32] *See, e.g.*, Comments of Dow at 12-14.

[33] Comments of Shell at 5.

[34] Comments of ASLRRA at 6.

In the current NOPR, the Board is proposing that merger applicants file Service Assurance Plans which describe measures that will be taken to ensure the continuation of adequate service and provide for improved service. The Board contemplates that the merger applicants may negotiate with shippers and Class II and III railroads to provide for mutually agreeable service assurance plans. The Board should encourage the parties to negotiate the terms of service assurances on a case-by-case basis.

IV. OVERSIGHT ISSUES

Some commenting parties assert that the Board's oversight authority should include the ability to impose penalties in the event that predicted merger benefits do not materialize. According to one party, "the Board must require the carriers promising merger benefits to deliver on the benefits or face economic sanctions. . . ."[35] The rationale for such extreme measures is that merger parties do not otherwise have the incentive after a merger is approved to achieve the benefits they promised.

To the contrary, it is clearly in the interest of the merging parties themselves to achieve the projected efficiencies and cost savings through well managed mergers. Merging parties are penalized in the marketplace if they are unable to achieve those savings. Arbitrary penalties would only add to the financial burden of a railroad that was unable to achieve anticipated cost savings.

No other industry is required to provide financial guarantees that good faith estimates of future benefits will be realized. The Board has ample opportunity to probe the bases for the merger applicants' projections and determine whether those projections are well founded. It

[35] Comments of Montana Wheat and Barley Committee et al. at 3. *See also* Comments of ARC at 5; California Public Utilities Commission ("CPUC") at 3-5.

would be inappropriate to impose on railroads standards of performance and financial burdens that no other industry must shoulder.

Several commenting parties also urge the Board to establish specific and inflexible reporting requirements during the oversight period.[36] The Board should impose reporting requirements on a case-by-case basis. By focusing on data that is relevant to specific mergers, the Board can carry out its oversight responsibilities most effectively and without creating unnecessary and costly reporting burdens on the merging parties.

V. CLASS II AND III RAILROADS

Several commenting parties urge the Board to adopt in the proposed merger rules the conditions set out in a document sponsored by the American Short Line and Regional Railroad Association (ASLRRA) entitled the "Short Line and Regional Railroad Bill of Rights."[37] The proposals in that document have been the subject of ongoing discussions and negotiations between AAR and the ASLRRA, and some of the issues were specifically addressed in the 1998 Rail Industry Agreement that AAR described in its November 17, 2000 Comments. Most of the proposals in that document, however, do not deal with rail mergers or the effects of rail mergers and they are not an appropriate subject of consideration in this proceeding.

As AAR indicated in its opening comments, its members view the Nation's short-line railroads as important partners. AAR is engaged in serious, on-going negotiations with those railroads over issues of importance to them, including some of the issues raised in the "Bill of Rights." The Board should not insert itself into those negotiations by giving consideration in this proceeding to issues unrelated to the effects of future mergers.

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[36] *See, e.g.*, Comments of NITL at 24-26; TFI at 11-12.

One of the proposals in the short line "Bill of Rights" urges the Board to endorse the right of short line and regional railroads to compensation for merger-related service disruptions. AAR has addressed that issue above, and it does not believe there is any reason for special treatment of short line railroads. The Board's proposed rules call for the merger applicants to submit Service Assurance Plans that specifically address the circumstances of Class II and III railroads. If those Plans fall short of providing sufficient protection to short line and regional railroads, the Board can address that matter in the merger proceeding.

VI. ACQUISITION PREMIUM

A number of parties complain that the Board's proposed rules do not address the treatment of any "acquisition premium" associated with future mergers.[38] This issue is a red herring. To the extent that a proposed transaction raises financial issues that bear upon the public interest, those issues should be examined on a case-by-case basis, which is the Board's current practice. The "acquisition premium" claim was dealt with exhaustively in the Conrail transaction, and the Board's disposition of this issue is currently pending before the U.S. Court of Appeals for the Second Circuit. There is no reason to address the issue in the proposed rules.

VII. COMMUTER INTERESTS

Several commenting parties support the Board's proposals for ensuring that commuter interests are considered in merger review and oversight proceedings.[39] AAR agrees that the interests of commuter agencies should be addressed by merger applicants and that the Board

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[37] *See, e.g.*, Comments of ASLRRA at 2-4; IMC at 5; PPL at 17-18.

[38] *See, e.g.*, Comments of ACC at 9-11; EEI at 11; NITL at 26-27.

[39] *See, e.g.*, Comments of USDA at 17-18; USDOT at 19.

should be available to address those interests during the oversight period in appropriate circumstances.

However, AAR does not believe that special treatment of commuter agencies is justified, as some parties suggest. Some commuter agencies want the Board to provide expanded access for commuter lines to the freight rail network of merging carriers.[40] These proposals are outside the scope of this proceeding because they are wholly unrelated to the effects of future mergers. What these parties propose would also amount to an unconstitutional taking of freight rail property.

AAR also objects to the proposal by Maryland Mass Transit Administration and Southern California Regional Rail Authority that merging railroads be required to make specific improvements in the railroad infrastructure for the benefit of commuter railroads.[41] Such action would be inconsistent with many contractual arrangements between freight railroads and commuter agencies and would unfairly penalize shippers as well as freight carriers.

VIII. ENVIRONMENTAL ISSUES

The Department of Transportation suggests that the Board's proposed rule encouraging environmental settlements between applicants and communities should be made clearer "in terms of the rights and responsibilities of communities."[42] Settlements with local governments regarding environmental impacts have historically been, and should remain, a matter of negotiation over the specific facts and circumstances respecting each community. AAR does not

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[40] *See, e.g.*, Comments of American Public Transportation Association at 2.

[41] See Comments of Maryland Mass Transit Administration and the Southern California Regional Rail Authority at 4.

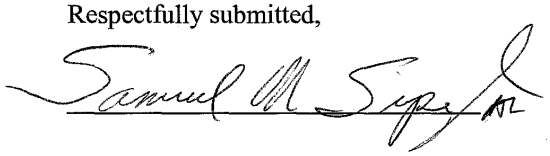
[42] Comments of USDOT at 20.

believe there is any credible basis on which the Board can meaningfully catalogue community rights and responsibilities, nor is there any reason why the Board should endeavor to spell out the rights of one set of parties to these negotiations.

AAR also opposes USDOT's suggestion that the Board require merger applicants "to provide up-to-date data to the DOT/AAR Highway-Rail Crossing Inventory for all crossings in the merged system."[43] The Inventory, administered by FRA, was set up over twenty five years ago as a source for data, most of which is highway traffic-oriented, on rail crossings. The bulk of the data is derived not from railroads, but from state highway agencies. If any changes to the Inventory are appropriate, particularly any changes that would turn what is now a voluntary data collection program into a mandatory one in terms of rail input, such changes should be made only after an FRA rulemaking or similar proceeding that addresses a specific set of proposals.

[43] *Id.*

Respectfully submitted,



Of Counsel:

JEFFREY R. MORELAND
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Railway Company

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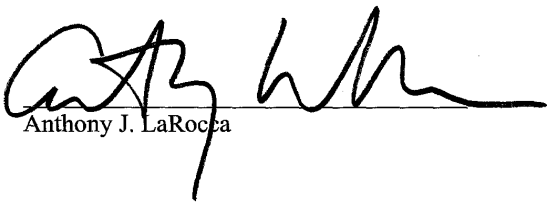
LOUIS P. WARCHOT
Association of American Railroads
50 F Street, N.W.
Washington, D.C. 20001

SAMUEL M. SIPE, JR.
ANTHONY J. LAROCCA
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795

Counsel for the Association
of American Railroads

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of December, 2000, a true and correct copy of the foregoing Reply Comments was served on all Parties of Record by first class mail:



Anthony J. LaRocca